MOTION TO AFFIRM FILED IN U. S. DISTRICT COURT, OCTOBER 26, 1947

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

No. 834—Civil

BRADY TRANSFER & STORAGE COMPANY, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint seeking to set aside an order

of the Interstate Commerce Commission. Findings of fact and conclusions of law, and the judgment and decree of the Court, were entered on September 3, 1948. Appeal was allowed on September 25, 1948, and appeal papers were served on October 11, 1948.

The Commission's order, dated February 3, 1947, was made in a proceeding docketed as No. MC-C-246, which was instituted by the Commission upon its own motion following complaints made by several motor carriers aggrieved by loss of business resulting from appellant's unauthorized operations. The Commission's order required appellant to cease and desist from the motor carrier operations which the Commission found that appellant was conducting without appropriate authority from the Commission.

Appellant holds operating authority between the Twin Cities (Minneapolis and St. Paul, Minnesota) and all points in Iowa as a carrier of general commodities *over irregular routes,* but admittedly has no corresponding authority as an operator *over regular routes.*[1]

The facts found by the Commission regarding the nature of appellant's actual physical operations are likewise undisputed.[2] As the Commission found, appellant frankly admitted that it was holding out to the public and was advertising a daily scheduled service between the Twin Cities and Fort Dodge, Iowa, and Spencer, Iowa: and

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[1] Appellant does hold extensive regular route authority between other points than those involved in this case.

[2] See pages 24-27, 55-56 of the Commission's report of February 3, 1947, 47 M.C.C. 23, reproduced as Appendix D to the complaint.

that, except for certain deviations, such scheduled service was in fact being regularly furnished.

The question for decision is whether the facts found by the Commission regarding appellant's operations warranted and justified, as a matter of law,[2] the Commission's determination that appellant, while admittedly holding only irregular route operating authority, had actually converted the character of its operation into that of a regular route carrier, and hence had exceeded its lawful authority and violated Section 206(a) of the Act by operating without authority.

If the Commission was correct in concluding that appellant's operations were not authorized under the terms of the certificate held by appellant, such operations were obviously unlawful and constituted a violation of Section 206(a) of the Interstate Commerce Act, as amended (49 U.S.C. 306(a)), which prohibits operation without an appropriate certificate of convenience and necessity from the Commission.

Appellant contends that the law establishes only one class of common carriers of property, and that irregular route carriers are at liberty to engage in regular route operations between any points within the territory covered by their certificates.

A similar contention was before this Court in *Falwell* v. *United States*, 69 F. Supp. 71 (W.D. Va., 1946), affirmed on motion 330 U.S. 807, in which the present appellant's contention was ex-

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[2] Appellant is precluded, not having offered in evidence before this Court the record made before the Commission, from challenging or attacking the findings made by the Commission. *Mississippi Valley Barge Line Company* v. *United States*, 292 U.S. 282, 286 (1934).

plicitly rejected by the district court in the language quoted in the note below.[4] One of the questions presented in that case and discussed in the briefs before this Court was whether the Commission committed error when it recognized and applied the distinction between regular and irregular route service. The Government's position, as set forth in its motion to affirm in the *Falwell* case, was that in giving effect to the distinction the Commission was following a construction of the statute approved by this Court in *United States* v. *Maher*, 307 U.S. 148 and *United States* v. *Carolina Freight Carriers Association*, 315 U.S. 475, 480. In the *Falwell* case, appellant herein, the Brady Com-

[4] This argument, as we understand it, amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to the highways (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to schedules of service or quantity or quality of service. And that, therefore, the holder of a certificate for irregular-route operations may, if he choose, utilize his rights or any part thereof to establish regularly scheduled operations over any highway within his territory—or in other words, to conduct his operations in the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificates for operations between the same points.

With this contention we cannot agree. To do so would grant to holders of irregular-route certificates a free hand to operate as they chose; to operate irregularly over such parts of the territory as they might choose and to establish regular-route operations where they so desired. An irregular-route certificate would be authority to conduct either or both forms of operations at the carrier's choice. It would nullify the distinction between regular and irregular route carriers and would nullify the power of the Commission to establish and maintain comprehensive and efficient service adjusted to the public need and free from destructive competition between carriers (69 F. Supp. at 77).

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pany through its present counsel, filed a brief as *amicus curiae* in this Court in opposition to the motion to affirm. That brief declared that the Brady Company's interest in the *Falwell* case resulted from the decision of the Commission in the present case; the brief indicated clearly that affirmance of the Commission's order by this Court in the *Falwell* case would be dispositive of the *Brady* case as well. As has been noted, this Court affirmed the decision upholding the Commission's order on motion and without opinion.

In the circumstances, a detailed discussion of the merits of the case in order to show the complete lack of basis for appellant's arguments seems unnecessary. The statutory provisions and the authorities are analyzed, in some detail, in the opinion of the Commission, attached to the complaint herein as Appendix D, pp. 9 *et seq.* (47 M.C.C. 31).

In short, various sections of the statute, and particularly Section 203 (a) (14) (49 U.S.C. Sec. 303 (a) (14)) indicate clearly that the Commission was to have power to distinguish between regular and irregular routes. See, in addition, Sections 208 (a), 207 (a), (49 U.S.C. Sec. 308 (a), 307 (a)). This Court recognized this in the *Maher* case, 307 U.S at 155. Although the *Maher* case was concerned with passenger transportation, the statutory provisions clearly apply to both transportation of passengers and property.

The distinction between regular and irregular operations has long been recognized in the industry. This appears from the authorities cited with approval by this Court in the *Maher* case

(307 U.S. at 155 n). *Motor Bus and Motor Truck Operation,* 140 I.C.C. 685, 699; *Coordination of Motor Transportation,* 182 I.C.C. 263, 274; *Coordination of Motor Transportation,* Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 34-35; *Regulation of Transportation Agencies,* Sen. Doc. No. 152, 73d Cong., 2d Sess., pp. 176, 191-192.

It is further to be noted that irregular route operators have been granted under the "grandfather clause" more extensive operating territory than the actual transportation service performed by them during the "grandfather" period would have warranted, simply because the Commission, with the approval of the courts, took account of the "transportation characteristics" of irregular route operation in determining the geographical scope of the operating authority to be granted. *Alton Railroad Company* v. *United States,* 315 U.S. 15, 21 (1942). The transportation characteristics of irregular route carriers are perhaps most strikingly shown in the case of household goods carriers, to which the Court refers in the *Alton* case. Thus in the case of some carriers of household goods, authority has been granted to serve an extensive area (embracing two entire states), notwithstanding the fact that no actual transportation was performed within such states during the "grandfather" period. *Aero-Mayflower Transit Company, Inc., Common Carrier Application,* 20 M.C.C. 633, 636-7 (1939). Similar liberality has been shown in the case of other irregular route carriers, the Supreme Court having approved the Commission's practice of considering the "characteristics of the transportation

service" rendered, in considering the territorial scope of the operations to be authorized. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 481-2 (1942).

Having thus obtained a larger territory than their actual transportation service during the "grandfather" period warranted, because the Commission took into account "the characteristics of irregular route carriers and their role in the national transportation system" (*Carolina* case, *supra*, p. 482), when determining the extent of their certificated territory, the irregular route carriers such as appellant are indeed seeking to "eat their cake and have it too" when they endeavor to expand their certificates into an authorization to engage in regular route operation whenever and wherever they see fit, to the detriment of regular route carriers who during the "grandfather" period had actually rendered regular service to the localities along the routes involved.

Such a result would do violence to the statutory purpose of preserving "substantial parity" between a carrier's certificated authority and its prior bona fide service during the "grandfather" period. *Alton* case, *supra*, 315 U.S. at p. 22 *Carolina* case, *supra*, 315 U. S. at p. 481.

Although it is recognized that the decision in this case is of importance to holders of irregular route certificates generally, it is evidence that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment and decree of the District Court should be affirmed.

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